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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re the Marriage of JESSE and SILA PLASOLA.	2d Civ. No. B286041 (Super. Ct. No. SM100449) (Santa Barbara County)
JESSE PLASOLA, Appellant, v. SILA PLASOLA, Respondent.	

In September 2006, Jesse Plasola and Sila Plasola ended their 13-year marriage. A decade later Jesse[1] attempts to appeal the trial court's orders awarding Sila half of the funds in his Thrift Savings Plan (TSP) and an interest in his Federal

[1] We refer to the parties by their first names to avoid confusion. No disrespect is intended.

Employment Retirement System (FERS) pension. We lack appellate jurisdiction to review those orders.

In October 2016, Jesse, appearing in propria persona, filed motions to vacate Sila's renewal of the TSP money judgment and to terminate spousal support. We affirm the trial court's order denying the motion to vacate the renewal of the money judgment. We reverse the order denying Jesse's motion to terminate spousal support and direct the court on remand to consider the factors in Family Code section 4320[2] in ruling on the motion.

FACTS AND PROCEDURAL BACKGROUND

Jesse and Sila were married on May 21, 1991. Jesse filed a petition for dissolution of the marriage on December 3, 1996. By 1999, the parties had reconciled.

In December 2005, Sila filed an order to show cause regarding child custody, child support and spousal support. Sila noted that Jesse had quit his job at a federal penitentiary, had moved to Arizona and had withdrawn approximately $80,000 from his TSP. The trial court granted custody of the children to Sila, ordered Jesse to pay $1,209 per month in child support and $489 per month in spousal support. The court determined that Sila had a community property interest in half of the money in the TSP and that she also was entitled to half of Jesse's FERS pension. It ordered Jesse not to remove any funds from the FERS pension without further order of the court.

The trial court found that Jesse had withdrawn $87,047.61 from his TSP after separation. It confirmed that Sila was entitled to half of that sum ($43,523.80). The court terminated the marriage and entered judgment on September 14, 2006. It found the length of the marriage to be 13 years, 6 months.

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[2] All statutory references are to the Family Code unless otherwise specified.

On December 1, 2015, Jesse began drawing $1,780.50 per month from his FERS pension. Sila has received none of those benefits. Jesse also did not pay Sila her half of the TSP. On September 9, 2016, Sila renewed the money judgment with respect to those funds. The amount due, with interest, is $87,041.83.

The trial court subsequently denied Jesse's motions to vacate the renewed money judgment, to set aside the division of the TSP and FERS pension, and to terminate spousal support. The court stated that if Sila starts receiving her share of the FERS pension, it may be in a position to terminate support. An order after hearing was filed on December 22, 2016.

Jesse moved for reconsideration of the trial court's rulings. In setting the matter for hearing, the court stated: "The length of the marriage is not going to be revised as this issue has already been litigated. It appears that [Jesse] is in violation of the 2006 court order where he was to seek approval of the court before drawing any pension benefits. The Court is not going to take the 2006 MSA and enforce some of the orders and not the others." The court further ordered Jesse to provide a full accounting of his FERS pension benefits.

At the May 3, 2017 hearing, the court treated the proceeding as a motion to reconsider the rulings in the 2006 judgment and denied it as untimely. The court determined that the 2006 judgment is the judgment in the case and that the terms in that document are the current orders of the court. It did clarify, however, that under the time rule, Sila is entitled to 25.96% of Jesse's FERS pension. It also found that the request to reconsider the division of the TSP was untimely. The court explained that "[t]he relitigation ends today."

The trial court further ruled that "[t]he issue of terminating spousal support will not be considered until such time as the TSP and pension plan payments for [Sila] are in place. Once [Sila] advises the Court that she is receiving benefits, the Court will consider [Jesse's] request to terminate spousal support."

An order after hearing was filed on September 11, 2017. Jesse appeals.[3]

DISCUSSION

Motion to Terminate Spousal Support

Jesse contends that the trial court's failure to weigh and consider the factors specified in section 4320 requires reversal of the order denying his motion to terminate spousal support. We agree.

A postjudgment order granting or denying a motion to modify spousal support is an appealable order. (Code Civ. Proc., § 904.1, subd. (a); see *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1158.) "Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.] Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.]" (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982.)

"'The trial court has broad discretion to decide whether to modify a spousal support order. [Citation.]' [Citation.] In exercising that discretion, the court must consider the required

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[3] Jesse also filed a motion requesting that Judge Timothy J. Staffel recuse himself in this matter. Judge Staffel granted the request, and the case has been reassigned to Judge Jed Beebe.

factors set out in section 4320. [Citation.] The court has discretion as to the weight it gives to each factor [citation], and then "'the ultimate decision as to amount and duration of spousal support rests within its broad discretion and will not be reversed on appeal absent an abuse of [its] discretion." [Citation.]' [Citation.] Failure to weigh the factors is an abuse of discretion. [Citation.]"[4] (*In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1273, fn. omitted (*Shimkus*); *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 304.)

Here, Sila concedes that Jesse's retirement from federal service constituted a change of circumstances. She also appears to agree that the trial court was required to weigh the section 4320 factors in deciding whether or not to terminate spousal support. Her view is that the court weighed those factors in denying Jesse's motion. The record, however, does not support this view.

At no point during the various hearings did the trial court reference the section 4320 factors. In originally denying the motion to terminate support, the court stated: "When [Sila] begins receiving her community share of the FERS retirement, the court will be disposed to reconsider this request." During the reconsideration proceedings, the trial court reiterated that the

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[4] Among other things, section 4320 requires the trial court to consider the extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage; the ability of the supporting party to pay spousal support; the obligations and assets, including the separate property, of each party; the age and health of the parties; the balance of the hardships to each party; the goal that the supported party shall be self-supporting within a reasonable period of time; and any other factors the court determines are just and equitable.

issue of termination of support "will not be considered until such time as the TSP and pension plan payments for [Sila] are in place."

In so ruling, the trial court considered the equities involved (see § 4320, subd. (n)), but its statements cannot be characterized as a weighing of all the relevant factors. For example, the court did not consider Sila's marketable skills, the ability of Jesse to continue paying spousal support, the needs of each party based on the standard of living established during the marriage, the duration of the marriage, and the goal that Sila shall be self-supporting within a reasonable period of time, generally one-half the length of the marriage. (§ 4320.)

Section 4320 requires the trial court to ""both recognize and apply each applicable statutory factor in setting spousal support. [Citations.]"" (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1297, italics omitted.) Neither the court's written orders nor the hearing transcripts reveal if or how the court considered these factors. In the absence of some indication that the section 4320 factors were considered and applied, the court abused its discretion in denying Jesse's motion to terminate spousal support. (*Shimkus*, *supra*, 244 Cal.App.4th at p. 1273.) Accordingly, the matter must be reversed and remanded for reconsideration of the motion. (See *id*., at pp. 1278-1279.) We express no opinion on how the court should rule on the motion on remand.

Motion to Set Aside Division of the TSP

The trial court denied as untimely Jesse's motion to set aside the division of the TSP funds. Jesse contends this ruling must be reversed because the monies were used to pay community debts. He maintains that Sila agreed to withdraw the funds for that purpose.

The trial court made the division in the September 14, 2006 judgment, which Jesse did not appeal. Sila contends that we lack appellate jurisdiction to consider Jesse's appeal regarding the division. She is correct. "Compliance with the time for filing a notice of appeal is mandatory and jurisdictional." (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582 (*Laraway*).) If a notice of appeal is not timely, the appellate court "must dismiss the appeal." (Cal. Rules of Court, rule 8.104(b); *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674 (*Hollister*); *In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1101-1102 ["We are powerless to extend the time to file a notice of appeal, or to hear untimely appeals"].)

Jesse concedes that he "appeals from the judgment entered on September 14, 2006," but provides no authority suggesting the trial court may revisit the rulings in the judgment some ten years later. Indeed, the latest possible time for filing a notice of appeal from that judgment was 180 days after its entry. (Cal. Rules of Court, rule 8.104(a)(1)(C); *Laraway*, *supra*, 98 Cal.App.4th at p. 582.) It is undisputed that Jesse did not file an appeal within that time period. When no appeal is taken from an appealable judgment or order within the statutory time limit, that judgment or order cannot be reviewed on an appeal from a subsequent order or judgment. (See, e.g., *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.) To the extent Jesse contests the division of the TSP, as set forth in the original judgment, we must dismiss his appeal as untimely.

Motion to Set Aside Division of the FERS Pension

Jesse also challenges the trial court's ruling on his motion to set aside the division of the FERS pension. We agree with Sila that the court appropriately denied the motion as untimely. We also agree that we lack appellate jurisdiction to reach this issue

since Jesse did not appeal the September 14, 2006 judgment. (See Cal. Rules of Court, rule 8.104(b); *Hollister*, *supra*, 15 Cal.3d at p. 674.)

Even if we had jurisdiction, Jesse would not prevail. Jesse concedes he is collecting a federal pension, but maintains that the federal government cancelled the FERS pension that was divided in the original judgment. The record does not support this claim. The letter from the U.S. Office of Personnel Management (OPM) dated September 29, 2016, merely states that at the time of Jesse's initial separation from federal service on March 14, 2005, he was not entitled to a retirement annuity because he had not reached his minimum retirement age. He subsequently returned to federal service and then retired at the appropriate retirement age. Jesse has provided no evidence that the pension he is collecting is not the FERS pension that he contributed to during the marriage.

Indeed, an April 6, 2018 letter from OPM confirms that when Jesse separated from federal service in 2005, he did not apply for a postponed/deferred annuity but elected instead "to leave [his existing] contributions for future use." The letter further explains that Jesse's completion of "additional service cancelled the postponed/deferred annuity rights and upon attaining age and service requirements [Jesse] applied for an immediate annuity. [His] retirement application was processed and [he] began receiving [his] monthly benefit."

As OPM notes, "[a]n individual is only eligible for one retirement benefit based on age and service with [FERS]. There is no other benefit payable. [Jesse is] receiving the maximum annuity allowed under the law for [his] service with the Department of Justice, Bureau of Prisons." This letter verifies,

therefore, that the annuity Jesse is currently receiving is based, in part, on contributions made during the marriage.[5]

Motion to Vacate Renewal of Money Judgment

Jesse challenges the trial court's denial of his motion to vacate renewal of the money judgment with respect to the TSP. We conclude he has not demonstrated an abuse of judicial discretion.

A motion to vacate the renewal of a money judgment may be brought "on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment . . . is incorrect." (Code Civ. Proc., § 683.170, subd. (a).) The judgment debtor bears the burden of proving by a preponderance of the evidence that he or she is entitled to relief under Code of Civil Procedure section 683.170. (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 199.) A court's order denying a motion to vacate renewal of a judgment is appealable as an order after the underlying judgment. (*Jonathan Neil & Associates, Inc. v. Jones* (2006) 138 Cal.App.4th 1481, 1487.) On appeal, we examine the evidence in the light most favorable to the trial court's order and review the court's ruling for abuse of discretion. (*Ibid.*)

Jesse contends the September 14, 2006 judgment is void and that the trial court erred by allowing interest at the rate of 10 percent per annum to accrue on the judgment. Jesse has not met his burden of proving by a preponderance of the evidence that the money judgment is void. As previously discussed, the

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[5] On May 15, 2018, Jesse requested that we take judicial notice of the April 6, 2018 letter from OPM and also a letter from Congresswoman Julia Brownley dated April 12, 2018. We grant the request. We also grant appellant's request for judicial notice filed on December 3, 2018.

trial court correctly awarded Sila her half of the community's interest in the TSP. Nor has Jesse demonstrated that the amount of the renewed judgment is incorrect. Code of Civil Procedure section 685.010, subdivision (a) expressly provides that "[i]nterest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." Sila properly included that post-judgment interest in calculating the amount owed.

DISPOSITION

The order after hearing filed on September 11, 2017 is reversed and the matter is remanded for the trial court to consider and apply the section 4320 factors in ruling on Jesse's motion to terminate spousal support. The order denying the motion to vacate the renewal of the money judgment is affirmed. The appeal from the orders denying Jesse's motions to set aside the division of the TSP and FERS pension is dismissed for lack of jurisdiction. Sila shall recover her costs appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Timothy J. Staffel, Judge
Superior Court County of Santa Barbara

Jesse Plasola, in pro. per, for Appellant.
Roger M. Hubbard, for Respondent.